



John E. Baldacci, Governor

Brenda M. Harvey, Commissioner

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Adult Guardianship Conservatorship

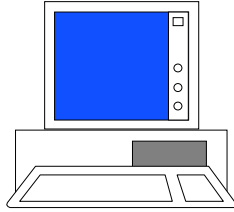
Questions & Answers



John E. Baldacci, Governor

Brenda M. Harvey, Commissioner

November 2007



The Office of Elder Services'
Guardianship/Conservatorship Questions & Answers
is also available on the Internet!

Point to:
<http://www.maine.gov/dhhs/beas>

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TTY: 1-800-606-0215

Somerset County Probate Court
Court Street
Skowhegan, ME 04976
Telephone474-3322

Waldo County Probate Court
39A Spring Street
P.O. Box 323
Belfast, ME 04915-0323
Telephone338-2780

Washington County Probate Court
P.O. Box 297
Machias, ME 04654
Telephone255-6591

York County Probate Court
P.O. Box 399
Alfred, ME 04002
Telephone324-1577



State of Maine

John Elias Baldacci
Governor

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Knox County Probate Court
62 Union Street
Rockland, ME 04841
Telephone594-0427

Lincoln County Probate Court
32 High Street
P.O. Box 249
Wiscasset, ME 04578
Telephone882-7392

Oxford County Probate Court
26 Western Avenue
P.O. Box 179
South Paris, ME 04281
Telephone743-6671

Penobscot County Probate Court
97 Hammond Street
Bangor, ME 04401-4996
Telephone942-8769

Piscataquis County Probate Court
159 East Main Street
Dover-Foxcroft, ME 04426
Telephone564-2431

Sagadahoc County Probate Court
752 High Street
P.O. Box 246
Bath, ME 04530
Telephone443-8218

Probate Courts

Androscoggin County Probate Court

2 Turner Street
Auburn, ME 04210
Telephone782-0281

Aroostook County Probate Court

26 Court Street, Suite 103
Houlton, ME 04730
Telephone532-1502

Cumberland County Probate Court

142 Federal Street
P.O. Box 15277
Portland, ME 04112
Telephone871-8382

Franklin County Probate Court

38 Main Street
Farmington, ME 04938
Telephone778-5888

Hancock County Probate Court

60 State Street
Ellsworth, ME 04605
Telephone667-8434

Kennebec County Probate Court

95 State Street
Augusta, ME 04330
Telephone622-7558

Introduction

Many Maine families, concerned about the well being of an adult family member or friend, have expressed a need for information about guardianship and conservatorship. Other individuals have questions about what it means to have a guardian or conservator appointed for them. This booklet provides readers with a general understanding of the adult guardianship and conservatorship process and answers some of the more commonly asked questions. This booklet addresses adult guardianship and conservatorship and does not address issues of guardianship or conservatorship for persons under 18 years of age.

Guardianship and conservatorship are intended to protect and provide continuing care for individuals who are unable to make or communicate responsible decisions for themselves. However, it is important to remember that obtaining guardianship or conservatorship is a very serious step to take because both significantly restrict a person’s individual rights and freedoms. They should be considered only after all other alternatives have been explored. The decision as to whether a guardian or conservator is necessary will be made by a Probate Court.

References to the Probate Code are included in parentheses throughout this booklet. These citations are to the Maine Revised Statutes Annotated, Title 18-A and indicate the section of the Code on which the answer is based. For example, the citation (5-101) refers to Title 18-A, Article V, Section 101 of the Probate Code.

Please note that this booklet is not intended as legal advice, particularly since the laws change from time to time and because there might be other factors involved which go beyond the scope of this booklet. If you have any questions about how the law applies to a specific situation, you should consult a lawyer.

General Information

When Is a Guardianship or Conservatorship Necessary?

The purpose of a guardianship or conservatorship is to ensure that continuing care is provided for persons who are unable to take care of themselves or their property. An illness or disability alone is not sufficient reason for guardianship or conservatorship. A guardianship or conservatorship will be imposed only if the person is determined to be **incapacitated** and in need of a guardian or conservator.

What Constitutes Incapacity?

Under Maine law, an incapacitated person is “any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause except minority to the extent that he lacks sufficient understanding or capacity to make or communicate reasonable decisions concerning his person.” (5-101) The critical factor is that the person must be unable to make or communicate responsible decisions regarding his or her own person or property. Whether a person meets the legal definition of incapacity is determined by the **Probate Court**.

Legal Services

Disability Rights Center

Local/Out-of -State V/TTY626-2774
Toll Free In-State V/TTY1-800-452-1948
(Provides legal representation to eligible individuals with developmental disabilities or mental illness who wish to oppose the appointment of a guardian).

Legal Services for the Elderly, Inc.

Legal Hotline
Local/Out-of-State623-1797
Toll Free In-State (Voice/TTY) 1-800-750-5353
(Provides legal representation to individuals aged 60 and older who wish to oppose the appointment of a guardian; provides general information and referrals to individuals aged 60 and older regarding guardianship and conservatorship).

Maine Bar Association Lawyer Referral Service

Local/Out-of-State622-1460
Toll Free In-State..... 1-800-860-1460

Resources

State Agencies

Maine Department of Health and Human Services

Office of Elder Services

442 Civic Center Drive, #11 State House Station
Augusta, ME 04333-0011
Local/Out-of-State287-9200
Toll Free In-State.....1-800-262-2232
TTY1-800-606-0215

Office of Cognitive and Physical Disability Services

40 State House Station
Augusta, ME 04333-0040
Local/Out-of-State287-4200
TTY.....1-800-606-0215

What Is a Guardian?

A guardian is an individual, organization or State agency appointed by the Probate Court to make decisions on behalf of a person that the Probate Court has found to be incapacitated. The person under guardianship is called a “**ward.**”

Unless the guardianship is limited by the Probate Court, the guardian has decision making authority for all aspects of a person’s life, except those specifically excluded by other laws, such as sterilization or involuntary commitment to State institutions. This complete guardianship may also be referred to as plenary, general or full guardianship.

What Is a Conservator?

A conservator is an individual, corporation or State agency appointed by the Probate Court to protect and manage the money and property of a person that the Probate Court has found to be incapacitated or otherwise unable to effectively manage his or her estate. The Probate Court must also determine that the person has property which will be wasted or dissipated unless proper management is provided or that management of funds is needed for the support, care and welfare of the person or others entitled to be supported by that person. The person under conservatorship is called a “**protected person.**” (5-101; 5-401)

General Information -Continued

What is a Limited Guardianship or Conservatorship?

Some people are able to make responsible decisions in some but not all areas of their lives. In such situations, a guardianship or conservatorship will be limited by the Probate Court to only those areas in which the person does not have the capacity to make responsible decisions.

For example:

- A guardianship could be limited to providing consent for medical treatment; or
- The Probate Court could limit a conservatorship by specifically withholding from a conservator the power to sell certain assets.

Since the law requires that the Probate Court help the incapacitated person stay as independent and self reliant as possible, a limited guardianship or conservatorship is preferable to full guardianship or conservatorship. (5-304; 5-408)

NOTES

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Ending or Changing - Continued

What Can Be Done if a Guardian or Conservator Is Unable or Unwilling to Fulfill His or Her Responsibilities?

The guardian or conservator, the ward or protected person, or any other interested person may at any time make a written request that the Probate Court either consider a different guardian or conservator for the incapacitated person or a change in the guardianship or conservatorship responsibilities. (5-307; 5-415; 5-416)

What Happens When the Ward or Protected Person Dies?

The authority of the guardian or conservator ends upon the death of the ward or protected person. The guardian or conservator should notify the Probate Court as soon as possible. Although guardianship can be terminated informally, the termination of a conservatorship requires the filing of a petition with the court and a final accounting.

What Is a Temporary Guardianship or Conservatorship?

A temporary guardian or conservator may be appointed without a hearing by the Probate Court for the following reasons:

- In emergencies to prevent serious, immediate and irreparable harm to the health or financial interests of the incapacitated adult when there is no other person who appears to have the authority to act in the circumstances. The Probate Court may act as the guardian or conservator or may appoint a temporary guardian or conservator immediately to deal with the emergency; or
- When the already appointed guardian or conservator is not effectively performing his or her duties and immediate action is necessary.

The court may appoint a temporary guardian or conservator for no longer than six months. The temporary guardian or conservator may be given all the powers and responsibilities of the permanent guardian or conservator except that the temporary guardian may not place the ward in any institution outside the State against the ward's wishes. If the allegedly incapacitated adult wishes to contest any aspect of the appointment, the Probate Court will hold an expedited hearing within 40 days. (5-310-A; 5-408-A)

The procedure for the appointment of a temporary guardian or conservator is described later in this book.

General Information –Continued

What Is the Relationship Between a Conservator and Guardian?

A guardian makes decisions about the ward's life and well being. If there is no conservator appointed, a guardian also may have limited authority over the ward's money and property. If the ward owns real estate or has a significant amount of money or property, the Probate Judge will generally appoint a conservator to make decisions about the ward's money and property. The same person can be both guardian and conservator or there may be a different person for each responsibility.

What Is a Fiduciary?

In handling a person's money or property as a guardian or conservator, the guardian or conservator is acting as a fiduciary. This means that the guardian or conservator is required to use the money or property for the benefit of the ward or protected person. A guardian or conservator may not treat the money or property of the ward or the protected person as if it were the guardian's or conservator's own funds and use them for his or her own benefit or for the benefit of family or friends. If a guardian or conservator does so, then he or she could be prosecuted for a crime or required by a court to pay back the value of what was taken from the ward or protected person.

How Can Objections Be Made to the Actions of a Guardian or Conservator?

The guardian or conservator, whether public or private, may be approached directly with the concern or objection. If this approach does not work in the case of a private guardian or conservator, then the objection can be taken to the Probate Court responsible for the guardianship or conservatorship. In the case of a public guardian or conservator, a reasonable next step would be to contact the supervisor of the State agency, since it might be possible to resolve the issue within the agency before involving the Probate Court.

A guardian or conservator who fails to act in the best interests of the ward or protected person can be removed by the Probate Court. The Judge may appoint a Visitor to investigate the situation and write a report. A hearing is held and notice is given to all people concerned. Parties may be represented by lawyers, present evidence and cross-examine witnesses.

Ending or Changing - Continued

How Can the Initial Order of Guardianship or Conservatorship Be Modified or Changed?

The Probate Court may modify or change the guardianship or conservatorship upon a written request to do so from the guardian or conservator, the ward or protected person, or any other interested party who has sufficient information to initiate a change. After notice to necessary persons and an opportunity for a hearing, the Court can then limit or expand the order for guardianship or conservatorship as it deems appropriate, or the Court can terminate the existing guardianship or conservatorship if it determines based on the evidence that the guardianship or conservatorship is no longer necessary. (5-307; 5-313; 5-416)

What Are the Rights of a Parent if Someone Else Becomes Private or Public Guardian of Their Adult Child?

When a guardian is appointed that guardian has the legal right and responsibility for decisions made on behalf of the ward. The parents have the right at any time to institute court proceedings to change or terminate the guardianship. The Court will act in the best interest of the ward.

What is the Difference Between a Private and Public Guardian or Conservator?

Public guardianship and public conservatorship mean an agency of the state government is the guardian or conservator. All other guardianships and conservatorships are considered private. A public guardian or conservator will be appointed only if there is no suitable private individual, institution or corporation who is both willing and able to assume these responsibilities. (5-602)

Who Acts as Public Guardian or Conservator?

The **Department of Health and Human Services** (DHHS) acts as public guardian and conservator. The DHHS Office of Elder Services acts as public guardian and conservator for incapacitated adults except those with mental retardation and/or autism. The DHHS Office of Cognitive and Physical Disability Services acts as public guardian and conservator for incapacitated adults with mental retardation and/or autism.

General Information –Continued

When is it Not Necessary to Have a Guardianship or Conservatorship?

Not everyone who is incapacitated needs a guardian or conservator. In some cases someone may already have the legal authority to make decisions on behalf of that person.

Some common legal arrangements are:

- A power of attorney for health care;
- A durable financial power of attorney; or
- A living trust.

These documents must be signed while the person still has capacity or they will not be legally valid.

Depending on the circumstances, a guardianship or conservatorship may not be necessary if a person who is now incapacitated previously executed one or more of these documents and the documents encompass the types of decisions that need to be made. Furthermore, even if a person has not executed one of these documents, it may still be possible for health care decisions to be made by a surrogate decision maker without the need for a guardian.

Ending or Changing a Guardianship or Conservatorship

For How Long Will a Guardian or Conservator be Appointed?

Guardianship and conservatorship are usually considered long term; however, the authority and responsibility a guardian or conservator can be terminated under the following circumstances:

- The guardian or conservator no longer wishes to serve in that capacity, resigns and the Court accepts the resignation; or
- A proceeding has been filed by or on behalf of the ward or protected person to have the guardian or conservator removed and the Probate Court orders that the guardianship or conservatorship be terminated.

The responsibilities of the guardian or conservator remain intact until the termination is approved by the court. (5-307; 5-415; 5-430)

What Happens If the Guardian or Conservator Dies or Resigns and there Is a Continuing Need for a Guardian or Conservator?

The Probate Court may appoint a successor guardian or conservator. Procedures for the appointment of a successor guardian or conservator are similar to those for appointing the initial guardian or conservator.

How a Guardian or Conservator is Appointed - Continued

If the allegedly incapacitated adult wishes to contest any aspect of the appointment, the Probate Court will hold an expedited hearing within 40 days. The court may appoint a temporary guardian or conservator for no longer than six months. (5-310-A; 5-408-A)

What is Surrogate Decision Making?

Under Maine law it may be possible for someone else, called a surrogate, to make decisions about health care on another person's behalf. A surrogate may make health care decisions for an adult who does not have a guardian or agent under a power of attorney for health care if that person has been determined by the primary physician to lack capacity. Among other requirements, the surrogate must follow any instructions or wishes expressed by the individual while that individual had capacity and must take into consideration the individual's personal values.

The law lists the following people who may act as a surrogate in descending order of priority: a spouse (unless legally separated); an adult who shares an emotional, physical and financial relationship with the patient similar to that of a spouse; an adult child; a parent; an adult brother or sister; an adult grandchild; an adult niece or nephew (related by blood or adoption); an adult aunt or uncle (related by blood or adoption); an adult relative of the patient (related by blood or adoption) who is familiar with the patient's personal values; and, lastly, an adult who has exhibited special concern for the patient and who is familiar with the patient's personal values. (5-805)

In some cases, a surrogate may be able to make health care decisions and a guardianship will not be necessary. In others, a guardianship may still be preferable or necessary depending on whether there is an adult available to act as surrogate and depending on the complexity of the issues involved, particularly if there is disagreement over the decisions being made.

Duties and Powers of a Guardian

Who Can Be a Guardian?

Any suitable, willing and able adult or institution, or certain State agencies, may be appointed guardian. The Probate Court may also appoint co-guardians (5-304). The Court will make the final decision based on the best interests of the person. (5-311; 5-602)

The law does not allow an owner, administrator, employee or other person with a substantial financial interest in a nursing home or other facility in which the person is living to serve as guardian unless that person is a spouse; an adult child; the parent of the ward; a relative that the ward has lived with for more than six months prior to the filing of the petition; or a person nominated by a deceased parent in a will to serve as the guardian of an incapacitated child. (5-311)

Who Gets Preference To Be a Guardian?

The law sets forth the following list **in order of preference** for the appointment of a guardian:

1. The person or organization nominated in writing by the person in need of a guardian;
2. The spouse;
3. The domestic partner;
4. An adult child;
5. A parent, including a person nominated by will or other writing signed by a deceased parent;
6. Any relative with whom the person in need of a guardian has lived with for more than six months prior to the filing of the petition;

How Does the Procedure Differ for Temporary Guardians and Conservators?

The petition for temporary guardianship or conservatorship must be accompanied by an affidavit explaining the emergency and the specific powers being requested. It must be shown that the appointment of a temporary guardian or conservator is necessary to prevent serious, immediate and irreparable harm to the health or financial interest of the incapacitated adult. The court will limit powers and duties to those necessary to address the emergency. (5-310-A).

With certain exceptions, oral or written notice must be provided prior to filing a petition to the incapacitated adult as well as to the person's spouse, parents, adult children or domestic partner known to the court. If there are no such persons, then the closest adult relative or, if none, an adult friend must be contacted. In addition, any person serving as guardian or conservator or who has care and custody of the adult must be notified. Prior notice is not required under the following circumstances: 1) giving notice places the incapacitated adult at substantial risk of abuse, neglect or exploitation; 2) notice if provided would not be effective; or 3) other good cause as determined by the court.

If a temporary guardian or conservator is appointed, the court within 2 days (excluding Saturdays, Sundays and legal holidays) will appoint a visitor or guardian ad litem to visit the incapacitated adult. A report must be made to the court within 10 days of the appointment of the visitor or guardian ad litem.

How a Guardian or Conservator is Appointed - Continued

The Probate Judge may enter a decision at the end of the hearing or may choose to review the evidence and issue a decision later. The Judge will either appoint a guardian or conservator with full or limited powers or decide not to appoint anyone if it appears that the person can take care of his or her affairs.

What Will it Cost to Obtain a Private Guardianship or Conservatorship?

There are several costs involved in filing for guardianship or conservatorship.

They are as follows:

- Fees to the Probate Court for filing the petition;
- Fees charged by the physician or psychologist for evaluating the individual's capacity, writing the report required by the Court and testifying; and/or
- Fees paid to the Visitor, Guardian ad Litem or attorney.

There may also be attorney's fees if the individual opposes the guardianship or conservatorship. In some cases, the person seeking the guardianship or conservatorship may hire a lawyer, particularly if the proceeding is complex or being contested by others. At the end of the proceeding, the person seeking the guardianship or conservatorship may request the Court to reimburse him or her for reasonable fees and costs out of the estate, if any, of the ward or the protected person. (1-601)

7. A person nominated by someone who is caring for the incapacitated person or paying benefits to him or her. (5-311)

What Are the Duties and Powers of a Guardian?

Unless modified by the Court, a guardian has most of the powers and duties that a parent has toward a minor child. The guardian, however, does not have to provide for the ward out of his or her money and is not liable to third persons for acts of the ward solely because he or she is guardian. (5-312)

- The guardian has custody over the ward and can decide where the ward will live, either in or out of state. The guardian may choose to have the ward live with him or her but is not required to do so.
- The guardian can put the ward in a hospital, nursing home, boarding home or other institution. However, the guardian is not allowed to commit the ward against his or her will to a mental health institution without going through the formal legal procedure for involuntary commitment.
- The guardian must see to the care, comfort and maintenance of the ward and, where appropriate, arrange for training and education.
- The guardian must take care of the ward's clothing, furniture, vehicles and other personal effects and commence protective proceedings if other property of the ward is in need of protection.
- The guardian does not have authority over the minor children of the ward, if any, unless the person files a separate petition and is also appointed as the guardian of the ward's minor children.

Duties and Powers of A Guardian - Continued

The Guardian is not allowed to sign a will for the ward. If the ward wishes to make out a will, a lawyer should be consulted to determine whether the ward is legally able to do so based on the ward’s mental capacity.

Can the Guardian Make Health Care Decisions for the Ward?

Generally, a guardian may make decisions about the ward’s medical and other professional care, counsel, treatment or service. In making health care decisions, the guardian must follow any instructions or wishes, including any **advance health care directives**, expressed by the ward while the ward had capacity and must take into consideration the ward’s personal values. (5-312; 5-806)

What is an Advance Health Care Directive?

An advance health care directive is an instruction made by a person with capacity regarding health care decisions.

The most common types of advance directives are:

- Powers of attorney for health care; and
- “Living wills”.

What Happens at the Hearing?

Before appointing a guardian or conservator, the Judge must be persuaded that:

- The person is incapacitated;
- The person needs someone to make personal decisions for him or her and/or manage his or her affairs; and
- The proposed guardian or conservator is suitable, willing and able.

If the individual does not object to having a guardian or conservator, the hearing before the Probate Judge is likely to be informal. The proposed guardian or conservator tells the Judge what he or she feels the best arrangement will be for the allegedly incapacitated person. The allegedly incapacitated person should be encouraged to attend the hearing and be involved in the process to the extent that he or she is able to do so.

If the proposed ward or protected person or someone else opposes the guardianship or conservatorship, or if there is any kind of disagreement, the hearing will be more formal. The proposed ward or protected person has the right to attend the hearing, to see and hear all of the evidence regarding his or her condition, to be represented by a lawyer (even if the he or she does not have money to pay for one), to present evidence to the Judge and to cross-examine witnesses or have the lawyer do so.

The individual or his or her attorney may request a closed hearing to protect that individual's privacy. This means that the only people allowed to attend will be the individual, the petitioner, witnesses, the proposed guardian or conservator and attorneys. Members of the public and observers will not be allowed in the courtroom.

How a Guardian or Conservator is Appointed - Continued

What Does the Guardian Ad Litem Do?

The Court also has the option of appointing a guardian ad litem for the proposed ward or protected person. The guardian ad litem must be a qualified professional and most Probate Courts require that the guardian ad litem be an attorney. The person serving in the capacity of guardian ad litem must make an independent investigation of the circumstances surrounding the issues being brought before the Probate Court and must see that the best interest of the person is considered and protected throughout the proceedings. A guardian ad litem is frequently appointed when a controversy exists or develops in a particular proceeding and the Court needs objective assistance in determining the best possible solution for the person.

How Does the Role of Guardian Ad Litem Differ from that of an Attorney for the Incapacitated Person?

The two roles are different. If an attorney is appointed to represent the proposed ward or protected person, the attorney is responsible for providing legal representation that supports the wishes and position of the proposed ward or protected person and litigates legal issues on behalf of that person. A guardian ad litem is to provide an objective assessment of all circumstances surrounding the requested appointment and to advocate as to what the guardian ad litem determines to be in the best interest of the proposed ward or protected person. The guardian ad litem also make recommendations to the court on behalf of the proposed ward or protected person

What is a Power of Attorney for Health Care?

A power of attorney for health care is a written document in which a person with capacity names another individual, called an agent, to make health care decisions for that person. The agent must follow any instructions or wishes expressed by the individual while that individual had capacity and must take into consideration the individual's personal values.

What Is a “Living Will”?

A “living will” is a term commonly used for a set of written instructions that explain a person's wishes regarding end-of-life decisions in the event that person becomes terminally ill and unable to communicate with his or her doctor.

What Happens if the Ward Has an Advance Health Care Directive?

A guardian may not revoke a ward's advance health care directive unless the Probate Court expressly authorizes the revocation. In addition, if the ward executed a power of attorney for health care while the ward had capacity and named someone else as agent, the health care decisions made by the agent take precedence over those of the guardian unless the Court orders otherwise. (5-806)

Duties and Powers of A Guardian - Continued

What Obligation Does the Guardian Have to Include the Ward in Decisions?

It is the guardian's duty to act in the best interests of the ward. Ideally, this includes discussing with the ward his or her needs and interests and involving the ward as much as possible in any decisions made or actions taken. Generally, the ultimate decisions are left to the guardian.

As a practical matter, the guardian may also not be able to control absolutely all aspects of the ward's life. Just as a minor child may at times resist a parent's wishes, a ward may do the same. In situations such as this, it is usually best for the guardian to recognize and respect that the ward may have certain needs and wants. This should be done on an individual basis, taking into account both the wishes and capabilities of the ward and the responsibilities and judgment of the guardian.

Is a Guardian Legally Responsible for the Acts of the Ward?

A guardian is not individually liable to others for the actions of the ward solely because he or she is the guardian. Generally, the guardian is only responsible if the guardian's own actions caused harm to another person. (5-312)

Is it Necessary for the Allegedly Incapacitated Person to Have an Attorney?

The proposed ward or protected person is entitled to be represented by an attorney. If the proposed ward or protected person wishes to contest any aspect of the proceeding or seek any limitation on the powers of the proposed guardian or conservator, the Court shall appoint an attorney to represent that person. (5-303; 5-407)

When Is a Visitor or Guardian Ad Litem Appointed?

Unless the proposed ward or protected person is already represented by an attorney, the Court shall appoint one or more of the following:

- a Visitor;
- a guardian ad litem; or
- an attorney

to represent the proposed ward or protected person in the proceeding (5-303; 5-407)

What Does a Visitor Do?

A Visitor is a person trained in law, nursing, social work or related disciplines who interviews both the proposed ward or protected person and the proposed guardian or conservator. In the case of a guardianship, the Visitor sees where the proposed ward is presently living and the place where he or she would live if a guardian were appointed.

The Visitor's report provides the Court with a better opportunity to make an appropriate judgment on behalf of the allegedly incapacitated person because the Visitor will have actually interviewed the proposed guardian or conservator, will have assessed the living arrangements in the case of a guardianship and will be able to make knowledgeable recommendations on behalf of the allegedly incapacitated person.

The Visitor must explain the meaning and possible consequences of the proceeding to the proposed ward or protected person and must find out whether he or she wishes to attend the hearing. The Visitor must also recommend the appointment of a guardian ad litem and/or attorney for the allegedly incapacitated person if the Visitor deems it necessary. The Visitor's report must be filed with the Probate Court at least 10 days before the hearing is held. (5-303; 5-407)

What Responsibilities Does a Guardian Have For the Ward's Finances?

When the ward has little money or property and no conservator has been appointed, the guardian has limited authority to manage the ward's money and property. If the ward owns real estate or has a substantial amount of money or property which he or she cannot manage effectively, the Probate Court may appoint a conservator in addition to a guardian or the Court may appoint one person to do the job of both guardian and conservator.

If no conservator has been appointed for the ward, the guardian should do the following:

- Collect and use the ward's money and assets for the ward's support, care and education;
- Save whatever money is left over for the ward's future needs;
- Make sure that those who are obligated to give financial support to the ward do so. For example, this may mean applying for support to a former employer, the Social Security Administration, the Veterans Administration, payers of private disability and pension benefits, insurance companies, Medicare, Medicaid or others; and
- Take reasonable care of the ward's property.

The guardian should be careful to keep the money in the ward's estate separate from the guardian's own estate, maintaining separate accounts and keeping careful records of all financial transactions.

If the ward has a significant amount of money or property in excess of his or her needs, the Probate Court should be notified and a conservator may need to be appointed.

Duties and Powers of A Guardian - Continued

How Does Guardianship Affect Representative Payee Status?

A representative payee is a person or entity appointed by a government agency to receive and handle the benefits provided by that agency to another person. If a guardian wishes to be the representative payee, the guardian must apply to the agency which provides the benefits to the ward (for example, the Social Security Administration). The agency providing the benefits, however, has the authority to appoint any person it chooses to be the representative payee. If appointed representative payee, the guardian will be responsible for receiving the ward's benefit check and using it for the ward's care and support.

Does Guardianship Transfer Across State Lines?

While some states may honor a guardianship established in another state, it is best to file a petition for guardianship in the state in which the guardian and ward are currently living. If the guardian and the ward live in different states, it generally works best if the guardianship is established in the state in which the ward lives. Because the laws, powers and responsibilities of guardians vary from state to state, the guardian should become familiar with the laws of the states involved.

Who Must Be Notified of the Proceeding?

Notice of the proceeding must be given to the allegedly incapacitated person. The law also requires that other interested parties receive notice. This includes the allegedly incapacitated person's spouse, parents, and adult children as well as anyone who is serving as guardian or conservator or who has care and custody of that person. If a spouse, parent or adult child is not notified, then at least one close relative, or if there is none, an adult friend must receive notice of the proceeding. (5-309; 5-405)

Is it Necessary for the Proposed Guardian or Conservator to Have an Attorney?

If the guardianship or conservatorship might be opposed or the issues involved are complex, the proposed guardian or conservator may choose to hire an attorney. Many of the forms, however, are simple and self-explanatory and do not necessarily require an attorney's assistance. Many Registers and Clerks of the Probate Court can be very helpful in providing the necessary forms and explaining generally how to fill them out.

How A Guardian or Conservator Is Appointed

What Is the Procedure for Becoming a Guardian or Conservator?

Several steps are involved in becoming a guardian or conservator. They are intended to provide the Court with information and protect the rights of everyone involved. The first step is to file a **petition** and other papers with the Probate Court in the county where the proposed ward or protected person (referred to in the law as the "allegedly incapacitated person") resides. Every county has a Probate Court. The Probate Judge will appoint a visitor, guardian ad litem or attorney, notice of the petition will be given to that person and other interested parties, and a hearing will be held.

What Papers Must Be Filed with the Court?

Besides a petition, the following papers need to be provided to the Court:

- A guardianship or conservatorship plan, stating how the person's medical, social rehabilitation and financial needs will be met or how the estate will be managed;
- A physician's or psychologist's report providing a diagnosis, prognoses and a statement regarding the person's current capacity to make personal and medical decisions or to manage financial affairs; and
- An acceptance of appointment signed by the proposed guardian or conservator.

What Should the Guardian Do If He or She Will Be Temporarily Unavailable to Make Decisions on Behalf of the Ward?

Obviously, making plans in advance is very important. As long as the guardian acts in the best interest of the ward, he or she may delegate responsibilities to another person or organization through a properly executed power of attorney. The guardian should give power of attorney to someone else to make emergency decisions in the event that the guardian is unavailable for a period of time. The power of attorney may be effective for up to six months and must be filed with the Probate Court. (5-104)

However, even if a guardian gives power of attorney to someone else, the guardian continues to maintain the ultimate responsibility for assuring that the needs and best interests of the ward are met. If the ward lives in a boarding or nursing facility or other institution, a copy of the power of attorney should be given to the facility to be kept on file.

Is a Guardian Entitled to Payment for His or Her Services?

A guardian may make a request to the Court for reasonable compensation for room and board, if any, provided by the guardian, expenses incurred and for the time spent acting as guardian to be paid from the funds of the ward. If a conservator has been appointed, the guardian should make the request to the conservator. (5-312)

Duties and Powers of a Conservator

Who Can Be a Conservator?

Any suitable, willing and able adult or corporation, or certain State agencies, may be appointed conservator. The Probate Court may also appoint co-conservators (5-401). The Court will make the final decision based on the best interests of the person. The law does not allow an owner, administrator, employee or other person with a substantial financial interest in a nursing home or other facility in which the person is living to serve as conservator unless that person is a spouse; an adult child; the parent of the protected person; a relative that the protected person has lived with for more than six months prior to the filing of the petition; or a person nominated by a deceased parent in a will to serve as the conservator. (5-410; 5-602)

Who Gets Preference To Be a Conservator?

The law sets forth the following list **in order of preference**:

1. A conservator or similar fiduciary appointed or recognized by a court in any other jurisdiction in which the protected person resides;
2. The person or organization named by the protected person;
3. The spouse;
4. The domestic partner;
5. An adult child;
6. A parent or the person nominated by the will of a deceased parent;
7. Any relative with whom the person in need of a conservator has lived with for more than six months prior to the filing of the petition;

Will A Conservator Be Required to Obtain a Bond?

A bond is a form of insurance paid for from the funds of the protected person. The bonding company promises to pay the estate of the protected person if money or property is lost through the wrongdoing, neglect or mismanagement of the conservator.

The law requires any conservator for an estate of \$25,000 or more to furnish a bond to prevent the protected person from possibly losing his or her money or property, unless the Court makes a specific finding why a bond is not required. The amount of the bond is based on the value of the money and property belonging to the protected person. It is within the Court's discretion to decide whether a bond will be required for estates less than \$25,000. (5-411)

Is a Conservator Entitled to Payment for His or Her Services?

A conservator is entitled to reasonable compensation for expenses incurred and for the time spent acting as conservator. (5-414)

Duties and Powers of A Conservator - Continued

What Is the Liability of a Conservator?

Generally, a conservator is not individually liable to others for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate unless he or she is personally at fault.

In entering contracts a conservator must disclose to third parties that he or she is acting as conservator on behalf of the protected person. If the third party is misled into believing that the conservator is acting on his or her own behalf rather than on behalf of the protected person, the third party may be able to hold the conservator personally liable on the contract. (5-429)

If, without good cause, a conservator does not file an inventory or accounting as required by the Court, the Court has the authority to require the conservator or the conservator's surety to pay an amount assessed by the Court to the protected person's estate. (5-418; 5-419)

Can the Conservator Seek Clarification from the Probate Court?

At any time following his or her appointment, a conservator may petition the Probate Court for instructions concerning the conservator's fiduciary responsibility. (5-416)

8. A person nominated by someone who is caring for the incapacitated person or paying benefits to him or her. (5-410)

What are the Duties and Powers of the Conservator?

The conservator is responsible for protecting and managing the money and property of the protected person. The conservator is not legally obligated to use his or her own money or property for the care and support of the protected person.

- The conservator must use income and assets for the reasonable care and support of the protected person. The conservator may make the payments directly or, if a separate guardian has been appointed, the conservator may give the funds to the guardian so that the guardian can make the payments. The conservator will be responsible for the accounting of those funds.
- If a separate guardian has been appointed, the conservator must listen to the guardian's recommendations as to what the ward's needs are and how money should be spent for the ward's care and support.
- A conservator may spend money for the care and support of the protected person's dependents. The conservator may also have to spend money for the care and support of members of the protected person's household who are not legally dependent but are unable to support themselves and who are in need of support.
- The conservator must manage and invest excess property and money of the protected person so as to provide a reasonable return. In doing so, the conservator has broad powers, including the powers to make investments, buy and sell property and borrow money on behalf of the protected person.

Duties and Powers of A Conservator - Continued

- The conservator may employ people, including lawyers, accountants and investment advisors, to assist the conservator in his or her duties and pay for those services from the protected person's funds. (5-424; 5-425)

The conservator is required to furnish an inventory of the estate of the protected person within 90 days of the appointment. The inventory must be filed with the Probate Court and be accompanied by an oath that the inventory is complete and accurate. The Court may require the filing of an annual or other periodic accounting to monitor the handling of the protected person's assets. (5-418; 5-419)

A private conservator appointed after January 1, 2008 must file an annual account with the Probate Court for approval. This requirement may be waived or modified by the Probate Court for good cause if the conservator is the spouse or domestic partner of the protected person. (5-418; 5-419)

The conservator is not allowed to sign a will for the protected person. If the protected person wishes to make out a will, a lawyer should be consulted to determine whether the protected person is legally able to do so based on the protected person's mental capacity.

What Is a Special Conservator?

The most limited form of conservatorship is called **Single Transaction Authority**. The Probate Court directs or approves a single act or transaction, which is needed in order for the protected person to get appropriate care and protection. The Probate Court will either carry out the transaction itself or appoint someone as the **special conservator** to do it. (5-409)

Single transactions may include:

- The payment of a bill, such as a mortgage payment or large debt to prevent foreclosure on a house or loss of a major asset;
- The sale, lease or mortgage of specified property to provide funds for the protected person's support;
- Entering into a contract for care and services for the protected person; and/or
- The creation of a trust for the protected person's benefit.

Can a Conservator Make Gifts on Behalf of the Protected Person?

The conservator is responsible for protecting and managing the property of the protected person for the support, education, care or benefit of the protected person and his or her dependents. If the estate is ample to provide for these purposes and there are sufficient assets in the estate, then a conservator for a protected person may make gifts to charity and to others as the protected person might have been expected to make. The total of these amounts may not exceed 20 percent of the protected person's annual income. The conservator must seek court approval prior to making larger gifts. (5-425)

What Happens If a Transaction Involves a Conflict of Interest?

Any sale or encumbrance to a conservator, his spouse, agent or attorney, or any corporation or trust in which the conservator has substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is voidable unless the transaction is approved by the Probate Court after notice to interested persons and others as directed by the Probate Court. (5-422)